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SUPPLEMENTAL WASHINGTON ANNOTATIONS, RESTATEMENT OF CONTRACTS

WARREN SHATTUCK*

It is now nearly three years since the Washington Annotations to the Restatement of Contracts was published. During this interval several developments have taken place. The Contracts Restatement has received an ever-increasing recognition from both courts and practitioners throughout the country.¹ Such recognition was perhaps inevitable in view of the eminence and ability of the men who formulated the propositions set out in the Restatement. It is the product of much labor, by Professor Williston and his fellow reporters, and by the distinguished judges, attorneys and teachers who constitute the American Law Institute. More particularly, recognition has progressed in Washington. Both Restatement and Annotations have had a wide sale here and our supreme court has cited the former in several recent decisions.²

During these three years our supreme court has adjudicated several hundred issues of contract law, eloquent evidence of the rapidity with which obsolescence attacks any volume of annotations which is not kept current. Since the Restatement can be most efficiently used only when all of the local decisions are readily accessible, it has appeared advisable to prepare this supplement.³ It is hoped that such current annotations may be published at shorter intervals of time in the future.

Section 5

A writing by the terms of which *X* promises to pay for the hauling of designated dirt and *Y* promises to haul it is a bilateral contract binding *Y* to do the hauling. *X*'s promise to furnish the dirt will be implied in fact. *Harms, Inc. v. Meade*, 186 Wash. 287, 57 P. (2d) 1052 (1936).

Section 12

A writing by the terms of which *X* promises to pay for the hauling of designated dirt and *Y* promises to haul it is a bilateral contract obligatory on both parties. It is not a mere offer by *Y* under which *Y* can cease performance at will. *Harms, Inc. v. Meade*, 186 Wash. 287, 57 P. (2d) 1052 (1936).

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¹RESTATEMENT IN THE COURTS, p. 164, 3rd Ed.

²*Wax v. Northwest Seed Co.*, 189 Wash. 212, 64 P. (2d) 513 (1937) (§73); *North Pacific Public Service Co. v. Clark*, 185 Wash. 132, 52 P. (2d) 1255 (1936) (§ 122); *First National etc. Co. v. United States Trust Co.*, 184 Wash. 212, 50 P. (2d) 904 (1935) (§133); *Brock v. Button*, 187 Wash. 27, 59 P. (2d) 761 (1936) (§ 192); *Miller v. Penn Mutual Life Ins. Co.*, 189 Wash. 269, 64 P. (2d) 1050 (1937) (§236); *State ex rel. Union etc. Assn. v. Sup. Ct.* 176 Wash. 482, 30 P. (2d) 231 (1934) (§375); *Irwin v. Pacific Fruit & Produce Co.*, 188 Wash. 572, 63 P. (2d) 382 (1936) (§420); *Broderson v. Rainier National Park Co.*, 187 Wash. 399, 60 P. (2d) 234 (1936) (§574).

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Section 24

An instrument, otherwise a warehouse receipt, does not show a contract of sale just because it recites: "The said Fred Schwab Commission Company hereby agrees to pay the seller the cash market value of the said wheat, upon demand and the surrender of this receipt." This statement is an offer. *Barnes v. Patrick*, 176 Wash. 142, 28 P. (2d) 293 (1934).

Section 26

Negotiations produce no contract where the parties contemplate that no obligation will arise until a formal written contract is executed, and such writing is not executed. *Strange & Co. v. Puget Sound Machinery Depot*, 176 Wash. 90, 28 P. (2d) 111 (1934).

To a written offer the offeree replied: "Accepted—subject to your satisfying me of your ability to finance this contract, and subject to a final contract being drawn covering all details, at the price set out (in the offer), same to be to my satisfaction and to be signed within five (5) days of date of award." These two communications were held to form a contract, the court indicating as bases for the decision: (1) waiver, in that the offeree refused to join in a formal written contract; (2) the fact that the offer and acceptance showed an agreement as to all of the details of the proposed contract. *Payne v. Ryan*, 183 Wash. 590, 49 P. (2d) 53 (1935).

Section 27

See *McPherson Bros. Co. v. Okanogan County*, 45 Wash. 285, 88 Pac. 199 (1907).

Section 40 (1)

An offer may, before acceptance, be modified by the offeror. He may set a time limit and an acceptance after such time has expired is ineffective. *Wax v. Northwest Seed Company*, 189 Wash. 212, 64 P. (2d) 513 (1937).

Section 59

Where X, in reply to an offer from Y to sell lumber f.o.b. X's trucks, proposed that Y load the lumber on railroad cars for an additional compensation, Y's offer is not thereby accepted. *Martinson v. Carter*, 190 Wash. 502, 68 P. (2d) 1027 (1937).

Section 60

Y offered to sell lumber to X f.o.b. X's trucks. X's reply, proposing that Y load the lumber on railroad cars for an additional compensation, is a counter-offer and not an acceptance. *Martinson v. Carter*, 190 Wash. 502, 68 P. (2d) 1027 (1937).

Section 70

To the earlier annotation add: *Menz. Lbr. Co. v. McNeeley &*

Co., 58 Wash. 223, 108 Pac. 621 (1910); *Pierson v. Northern Pacific Railway Co.*, 61 Wash. 450, 112 Pac. 509 (1911); *Denbigh v. First National Bank*, 102 Wash. 546, 174 Pac. 475 (1918); *Union Mach. & Supply Co. v. Taylor-Morrison Logging Co.*, 143 Wash. 154, 254 Pac. 1094 (1927).

Section 72 (1)

An offer to rescind a contract for the purchase of real property is not accepted by the offeree's silence. *Roethemeyer v. Milton*, 177 Wash. 650, 33 P. (2d) 99 (1934).

X sent to Y his check, accompanied by a letter indicating that the remittance was sent as a part payment of W's debt to Y and on the condition that Y extend the maturity date of that debt for an indicated period. Y replied, proposing a more limited extension. X's failure to answer that counter-offer is not an acceptance of it. *Maxwell v. Provident Mutual Life Ins. Co.*, 180 Wash. 560, 41 P. (2d) 147 (1935).

A purported acceptance, made after the offer has expired, is a counter-offer and is not accepted by the offeree's silence. *Wax v. Northwest Seed Co.*, 189 Wash. 212, 64 P. (2d) 513 (1937).

Section 72 (2)

The vendee under a contract to purchase real property sent to the vendor a quitclaim deed reciting in part: "This deed is given to surrender and rescind contract between the parties hereto for the purchase of the above described real estate . . ." This is an offer to rescind and retention of the deed by the vendor for two months is not an acceptance. He attempted no dominion over the property and owed no duty to return the deed. *Roethemeyer v. Milton*, 177 Wash. 650, 33 P. (2d) 99 (1934).

X sent to Y his check accompanied by a letter indicating that the check was sent as part payment of W's debt to Y and on the condition that Y extend the maturity date of that debt for an indicated period. This is an offer, accepted by Y's cashing of the check and retention of the proceeds. *Maxwell v. Provident Mutual Life Ins. Co.*, 180 Wash. 560, 41 P. (2d) 147 (1935).

Section 73

A purported acceptance made after the offer has expired is a counter-offer and cannot be regarded by the original offeror as an acceptance. *Wax v. Northwest Seed Company*, 189 Wash. 212, 64 P. (2d) 513 (1937). The Restatement was cited.

Section 75 (1) (b)

The provision in a note: "In case of the non-payment of any interest on said note when due, such interest shall be added to and become a part of the principal of said note and shall bear interest at the rate aforesaid", does not bind the obligee to forbear suit

for interest payments as they mature. The obligor's promise to pay compound interest is accordingly without consideration even though the obligee has in fact refrained from suing for such interest as it accrued. *Stauffer v. Northwestern Mutual Life Ins. Co.*, 184 Wash. 431, 51 P. (2d) 390 (1935).

A forfeitable real estate contract being in default, the vendor's forbearance from declaring a forfeiture affords consideration for a promise to pay the past-due installments, made by one who had acquired the vendee's rights under the contract without assuming the vendee's obligations thereunder. *McHugh v. Rosaia*, 184 Wash. 463, 51 P. (2d) 616 (1935).

Section 76 (a)

Payment of accrued rent under a lease will not provide consideration for an alleged accord and satisfaction of future rent thereunder. *Seattle Investors Syndicate v. West Dependable Stores*, 177 Wash. 125, 30 P. (2d) 956 (1934).

Payment by an employer who is bound by Seattle ordinance 60812 of less than the wage stipulated in such ordinance will not support an alleged accord and satisfaction with his employee. *Goebel v. Elliott*, 178 Wash. 444, 35 P. (2d) 44 (1934).

X, having contracted with *Y* to dump dirt in a specified portion of Elliott Bay, performed in part so carelessly as to make it impossible to continue dumping there. Although *X* would have been bound to bear the additional expense entailed in dumping at another place, *Y*'s promise to share such expense is enforceable since *Y* was anxious to expedite the work and *X* has acted on the promise. *Nelson v. Seattle*, 180 Wash. 1, 38 P. (2d) 1034 (1934). This decision appears to be contra to the Restatement.

Payment of the principal sum admitted by a debtor to be due will support an accord and satisfaction of a disputed claim for interest on such debt. *Paulsen Estate Inc. v. Naches-Selah Irrigation District*, 190 Wash. 205, 67 P. (2d) 856 (1937). See, too, the decisions annotated under Section 417.

Sections 76 (a) and (b)

Salvage of but \$400 remaining after a fire in a building insured for \$10,000, the loss is as a matter of law total. The valued policy statute, Rem. 7150 and 7151, thus comes into operation despite the insurer's contention that the loss is partial. The face amount of the policy being due the payment by the insurer of less than that sum will not support an accord and satisfaction of the policy. *Grandview Inland Fruit Company v. Hartford Fire Ins. Co.*, 189 Wash. 590, 66 P. (2d) 827 (1937).

See also the cases annotated under Section 417.

Section 76 (b)

A loss occurred under an accident insurance policy which stipulated for reduced benefits should the insured be injured while engaged in an occupation more hazardous than that indicated in the policy. The insurer's surrender of a bona fide contention that the insured was in a more hazardous occupation when injured affords consideration for the insured's promise to receive in full settlement sums less than were provided on the face of the policy. *Clubb v. Sentinel Life Insurance Co.*, 181 Wash. 284, 42 P. (2d) 792 (1935). See also the cases annotated under Sec. 417.

Section 79

The promise of the employer in a contract of employment terminable at his pleasure will not provide consideration for the employee's promise not to compete upon termination of the employment. *Schneller v. Hayes*, 176 Wash. 115, 28 P. (2d) 273 (1934).

Section 81

The promise of an assignee thereof to pay the rents reserved in a lease is not shown to be gratuitous by evidence which indicates that when he received the assignment he paid to the assignor in money a sum which was the full valuation set by the parties on the lease. *Puget Mill v. Kerry*, 183 Wash. 542, 49 P. (2d) 57 (1935).

Section 82

An alleged accord and satisfaction between insurer and insured recited a cash payment by the insurer as consideration for a release of its liability. This consideration failed. The insurer may not introduce parol evidence to show the existence of other consideration for such release. *Grandview Inland Fruit Co. v. Hartford Fire Ins. Co.*, 189 Wash. 590, 66 P. (2d) 827 (1937). This situation, although not covered by the language of Sec. 82, appears to have been contemplated by the draftsmen as coming within the rule of the section. See the first illustration. If this assumption be accurate, the case is *contra* to the Restatement.

Section 84

Services rendered gratuitously will not provide consideration for the recipient's later promise to pay. *Irons Investment Co. v. Richardson*, 184 Wash. 118, 50 P. (2d) 42 (1935). This situation is not within the purview of Sec. 84. It belongs, however, with the miscellaneous problems annotated under that section for lack of a better place. See Washington Annotations, page 42.

Section 86

To the earlier annotations add: *Lieberman v. Gurensky*, 27 Wash. 410, 67 Pac. 998 (1902); *Hein v. Forney*, 164 Wash. 309, 2 P. (2d) 741 (1931).

Section 90

To the earlier annotations add: *Coleman v. Larson*, 49 Wash. 321, 95 Pac. 262 (1908); *Hudson v. Ellsworth*, 56 Wash. 243, 105 Pac. 463 (1909); *Raymond v. Hatrick*, 104 Wash. 619, 177 Pac. 640 (1919).

Section 122

The liability of a joint contract obligor is not diminished by a release of his co-obligors, where the release reserves the obligee's rights against such obligor. *North Pacific Service Co. v. Clark*, 185 Wash. 132, 52 P. (2d) 1255 (1936). The Restatement was cited.

Section 133 (1) (a)

Stover v. Winston Bros., 185 Wash. 416, 55 P. (2d) 821 (1936).

Section 133 (1) (b)

Insurance cases: *Keseleff v. Sunset Highway, etc. Co.*, 187 Wash. 642, 60 P. (2d) 720 (1936); *Mitchell v. Cadwell*, 188 Wash. 257, 62 P. (2d) 41 (1936). In both cases the plaintiff was found to be no beneficiary.

Miscellaneous: *First National, etc. Co. v. United States Trust Co.*, 184 Wash. 212, 50 P. (2d) 904 (1935).

Section 133 (1) (c)

Pacific Mercantile Agency, Inc. v. First National Bank, 187 Wash. 149, 60 P. (2d) 6 (1936).

Section 135 (a)

Seattle contracted with *X* for the erection by the latter of a dam, the contract requiring *X* to pay his laborers certain minimum wages. *X* paid less. The laborers can recover of *X* the difference between wages paid and wages stipulated to be paid by *X*'s contract with Seattle. *Stover v. Winston Bros. Co.*, 185 Wash. 416, 55 P. (2d) 821 (1936).

Section 136 (1) (a)

X promised *Y* to pay to *W* one half of *Y*'s debt to *W*. *W* may enforce *X*'s promise. *First National, etc. Co. v. United States Trust Co.*, 184 Wash. 212, 50 P. (2d) 904 (1935). The Restatement was cited. *X*'s promise was, by its own terms, to pay to *Y* half of *Y*'s debt to *W*. The court, however, appears to construe the promise as one to pay *W*.

Section 140

The employer's assent to a "President's Re-employment Agreement" entered into between President Roosevelt and an employer pursuant to the N. I. R. A. was induced by duress and the promise therein that the employer would maintain indicated wage levels is unenforceable by his employees. *McDonald v. Pend Oreille, etc. Co.*, 189 Wash. 389, 65 P. (2d) 1250 (1937).

Section 142

The interest of a life insurance beneficiary is subordinate to that of an assignee of the policy, although the insured's reserved power to change beneficiaries permitted the naming of a new beneficiary from a limited class only. *Massachusetts Mutual Life Ins. Co. v. Bank*, 187 Wash. 565, 60 P. (2d) 675 (1936).

Section 144

Corkrell v. Poe, 100 Wash. 625, 171 Pac. 522 (1918), was followed in *Citizens, etc. Society v. Chapman*, 173 Wash. 539, 24 P. (2d) 63 (1933).

Section 147

X contracted to sell land to Y. Y was to construct a barn on the property and improve other buildings. X was to furnish \$1,200 worth of material to be used in such work. W, who sold to Y lumber used in making the improvements, cannot sue X on X's promise to Y. *Pacific Mercantile Agency, Inc. v. First National Bank*, 187 Wash. 149, 60 P. (2d) 6 (1936).

Section 150 (2)

Under Washington statutes an assignee for collection is an assignee for value and may sue in his own name despite the fact that the assignor also has an interest in the chose. *Washington State Bar Assn. v. Merchants Rating and Adjusting Co.*, 183 Wash. 611, 49 P. (2d) 26 (1935).

Section 151 (c)

A provision in a real estate contract, prohibiting an assignment of his interest by the vendee save with consent of the vendor, is enforceable. An unauthorized assignee acquires no rights under the contract. *Bethel v. Matthews*, 187 Wash. 175, 59 P. (2d) 1125 (1936).

A life insurance policy provision indicating that the insurer will recognize no assignment not properly filed at its home office may be invoked only by the insurer. *Massachusetts Mutual Life Ins. Co. v. Bank*, 187 Wash. 565, 60 P. (2d) 675 (1936).

Section 166 (1)

A promise to pay a debt from the proceeds of a certain crop is not an assignment of such proceeds. *Sneesby v. Livingston*, 182 Wash. 229, 46 P. (2d) 733 (1935).

Section 167 (1)

"County warrants are not negotiable instruments. While assignable, the assignee takes title subject to any defect, irregularity, or illegality in their issue." *State v. Burnham*, 185 Wash. 556, 56 P. (2d) 170 (1936).

Section 180

X, having contracted to drill for oil on Y's property, stopped

work because Y defaulted on its promise to pay. W's oral promise to X to pay for both past and future drilling if X would continue his performance is unenforceable. *Jannsen v. Curtis*, 182 Wash. 499, 47 P. (2d) 662 (1935). The court did not mention the requisite indicated in Sec. 180, i. e., that there exist a suretyship relation between Y and W.

Section 184

That a surety owns half the stock of the principal, a corporation, will not, without further proof of benefit to the surety, render an oral promise of suretyship enforceable. *Jannsen v. Curtis*, 182 Wash. 499, 47 P. (2d) 662 (1935).

Section 192

R. R. S. Sec. 5825 (3) in excluding mutual promises to marry does not mean that oral contracts to marry are entirely outside the Statute of Frauds. R. R. S. Sec. 5825 (1) is applicable to such contracts. *Brock v. Button*, 187 Wash. 27, 59 P. (2d) 761 (1936). The Restatement was cited.

Section 197

"Under a parol contract, where the purchaser takes possession and makes permanent improvements, we have held that, because of such part performance, the statute of frauds does not apply." *Manke v. Peterson*, 181 Wash. 185, 42 P. (2d) 39 (1935). The action was not for specific performance. It was an action at law to recover damages for breach of a real estate contract and carries the doctrine of part performance further than is contemplated by Sec. 197.

The doctrine of part performance will not be applied to an oral contract which comes under R. R. S. Sec. 5825 (1) (contracts not to be performed within one year), *Hamilton v. Atlas Freight, Inc.*, 184 Wash. 199, 50 P. (2d) 522 (1935).

Section 198

A written contract in which X undertakes to haul freight for Y during a five-year period and to post a bond guaranteeing his performance, and Y undertakes to pay for such service, becomes an oral contract and unenforceable when Y orally waives its right to the bond. *Hamilton v. Atlas Freight, Inc.*, 184 Wash. 199, 50 P. (2d) 522 (1935). Cf. *Gabrielson v. Swinburne*, 184 Wash. 242, 51 P. (2d) 368 (1935).

An oral contract to marry, not to be performed within a year, is unenforceable under R. R. S. Sec. 5825 (1). *Brock v. Button*, 187 Wash. 27, 59 P. (2d) 761 (1936).

Section 199

X loaned Y funds to finance in part the raising of a hop crop. Y promised orally to sell the crop to X, the debt to be repaid

from the proceeds of such sale. When harvested, the crop was set aside in Y's warehouse, intended for delivery to X, but still stamped with Y's initials. The loan did not constitute "payment" under R. R. S. 5836-4. Nor did the segregation of the hops, coupled with the mental determination that they were to go to X, constitute delivery. *Rivard v. Loudon*, 184 Wash. 234, 50 P. (2d) 914, 50 P. (2d) 1151 (1935).

Section 205

A loan from X to Y, used to finance in part the raising of a hop crop, does not constitute "payment" or "earnest" under a contemporaneous oral contract by which Y was to sell the crop to X. *Rivard v. Loudon*, 184 Wash. 234, 50 P. (2d) 914, 50 P. (2d) 1151 (1935).

Section 223

A written contract, required by the Statute of Frauds to be written, becomes oral and unenforceable when modified by an oral agreement. *Hamilton v. Atlas Freight, Inc.*, 184 Wash. 199, 50 P. (2d) 522 (1935). This case is *contra* to the Restatement.

Section 226

An instruction informing the jury that the "principal rule in the interpretation of contracts is to ascertain the true intention of the parties" states the law correctly. *Stusser v. Gottstein*, 178 Wash. 360, 35 P. (2d) 5 (1934). *Cf.* Comment (b) Sec. 230, Restatement.

Section 230

"The intention of the parties to a contract, when clearly expressed in the instrument, must govern. (cases cited.) Where the contract is unambiguous, the intention of the parties must be derived from such construction as can reasonably be given to the language used and to all the circumstances surrounding the transaction, including the situation of the parties, the subject matter, and the subsequent acts of the parties under it." (cases cited.) *Thomle v. Soundveiw Pulp Co.*, 181 Wash. 1, 42 P. (2d) 19 (1935). See, however, the cases annotated under this Section, Washington Annotations.

Section 234

See *Olympic Securities Co. v. Penn. Fire Ins. Co.*, 135 Wash. 307, 237 Pac. 707 (1925).

Section 235 (a) and (b)

United Fig & Date Co. v. Falkenburg, 176 Wash. 122, 28 P. (2d) 287 (1934); *Hess v. Business Men's etc. Co.*, 189 Wash. 71, 63 P. (2d) 535 (1937).

Section 235 (c)

Nelson v. Seattle, 180 Wash. 1, 21, 38 P. (2d) 1034 (1934).

Section 236

"The rule is well established that, if the recitals are clear and the operative part is ambiguous, the recitals govern the construction. If the recitals are ambiguous and the operative part is clear, the operative part prevails. If both the recitals and the operative part are clear, but inconsistent with each other, the operative part is to be preferred." *First National etc. Co. v. United States Trust Co.*, 184 Wash. 212, 219, 50 P. (2d) 904 (1935).

Section 236 (d)

Insurance cases: *Brown v. Northwestern Mutual Fire Assn.*, 176 Wash. 693, 30 P. (2d) 640 (1934). In *Samarzich v. Aetna Life Ins. Co.*, 180 Wash. 379, 40 P. (2d) 129 (1935), and *Miller v. Penn Mutual Life Ins. Co.*, 189 Wash. 269, 64 P. (2d) 1050 (1937), the rule of this subsection was refused application, on the ground that the contract was not ambiguous.

Miscellaneous contracts: *Nelson v. Seattle*, 180 Wash. 1, 9, 38 P. (2d) 1034 (1934); *Stephenson v. Kenworthy Grain etc. Co.*, 186 Wash. 114, 56 P. (2d) 1301 (1936); *Rumas v. Baldwin*, 188 Wash. 558, 62 P. (2d) 1345 (dic.) (1936); *Irwin v. Pacific Fruit & Produce Co.*, 188 Wash. 572, 63 P. (2d) 382 (dic.) (1936).

Section 236 (e)

A typewritten portion of a contract controls over the printed portion thereof, where the two are not reconcilable. *Creditors Assn. v. Frey*, 179 Wash. 339, 37 P. (2d) 688 (1934).

Although a rider attached to an insurance policy will be construed together with the printed portion of the policy, if there be an irreconcilable conflict between them the rider controls. *Miller v. Penn Mutual Life Ins. Co.*, 189 Wash. 269, 64 P. (2d) 1050 (1937).

Section 237

Samarzich v. Aetna Life Ins. Co., 180 Wash. 379, 40 P. (2d) 129 (1935); *Ross v. Cappon*, 185 Wash. 389, 55 P. (2d) 329 (1936) (the possible applicability of the rule of Sec. 240 was not discussed); *Lally v. Graves*, 188 Wash. 561, 63 P. (2d) 361 (1936) (holding that the inadmissibility of evidence, because of the parol evidence rule, cannot be raised for the first time on appeal); *Webb etc. Co. v. Coyle*, 188 Wash. 658, 63 P. (2d) 475 (1936); *Grandview Inland Fruit Co. v. Hartford Fire Ins. Co.*, 189 Wash. 590, 66 P. (2d) 827 (1937).

Section 238 (a)

Stusser v. Gottstein, 178 Wash. 360, 35 P. (2d) 5 (1934).

Section 238 (b)

Champlin v. Transport Motor Co., 177 Wash. 659, 33 P. (2d)

82 (1934); *Peoples Bank & Trust Co. v. Romano Eng. Corp.*, 188 Wash. 290, 62 P. (2d) 445 (1936).

Section 238 (c)

Mossuto v. United States Casualty Co., 180 Wash. 481, 492, 40 P. (2d) 170 (1935).

Section 240 (1)

A written conditional sale contract for the purchase of a car will not bar proof of a contemporaneous oral contract by which the vendor promised to indemnify the vendee for any loss he might sustain in consequence of entering into the conditional sale contract. *Champlin v. Transport Motor Co.*, 177 Wash. 659, 33 P. (2d) 82 (1934). (See Annotations to Section 493 (e), below.)

A written contract for the sale of a dry cleaning business by *Y Corp.* to *X* will not bar proof of an oral contemporaneous contract by which *S*, a shareholder of *Y Corp.*, promised not to compete with *X*. *United Dye Works v. Strom*, 179 Wash. 41, 35 P. (2d) 760 (1934).

Section 246 (b)

In an action on an express oral contract to buy and sell oysters, *P* contends that *D* promised to pay 10c per bushel. *D* contends that he promised to pay, not on a bushel basis, but on the quantity of canned oysters produced from those purchased of *P*. Since the contract is unambiguous under either version, *D* may not introduce evidence of custom in order to sustain his position. *Katzer v. Cron & Dehn*, 183 Wash. 215, 48 P. (2d) 204 (1935).

Section 247

"To establish a custom tacitly attending the obligations of a contract, it must be shown to be uniformly prevalent and universally observed, so that it may be said that the contracting parties either had such custom in mind or else must be presumed to have had it in mind, and consequently to have contracted with reference to it. Furthermore, the evidence to establish custom must be clear and convincing, free from ambiguity, uncertainty or variability. It must be positively established as a fact, and not left to be drawn as an inference from isolated transactions." *Washington Brick etc. Co. v. Anderson*, 176 Wash. 416, 29 P. (2d) 690 (1934).

Section 250 (a)

Cases involving insurance contracts and denying relief because a condition precedent was not satisfied nor excused: *Rivers v. New York Life Ins. Co.*, 176 Wash. 674, 30 P. (2d) 663 (1934); *Kearns v. Penn Mutual Life Ins. Co.*, 178 Wash. 235, 34 P. (2d) 888 (1934); *Eakle v. Hartford Accident & Indemnity Co.*, 185 Wash. 520, 55 P. (2d) 1072 (1936).

Cases involving insurance contracts and holding that a condition precedent was satisfied or inoperative: *Bloss v. Equitable Life Assurance Society*, 176 Wash. 1, 28 P. (2d) 303, 33 P. (2d) 375 (1934) (court evenly divided); *Reynolds v. Travelers Ins. Co.*, 176 Wash. 36, 28 P. (2d) 310 (1934); *Hedrick v. Washington National Ins. Co.*, 186 Wash. 263, 57 P. (2d) 1038 (1936); *Lienhard v. Northwestern etc. Assn.*, 187 Wash. 47, 59 P. (2d) 916 (1936).

Section 257

The varying consequences of breach of promise and failure of conditions to occur, in contracts for the sale of personal property, are discussed in *Crandall Engineering Co. v. Winslow etc. Co.*, 188 Wash. 1, 61 P. (2d) 136 (1936).

Section 258

Kearns v. Penn. Mutual Life Ins. Co., 178 Wash. 235, 34 P. (2d) 888 (1934).

Section 267 (b)

The duty to pay and the duty to convey are dependent and concurrent, where *D* was to repurchase property upon demand made by *P* prior to an indicated date. *Stusser v. Gottstein*, 178 Wash. 360, 35 P. (2d) 5 (1934).

Section 273 (1)

Normally, the vendor under a contract for the sale of land may not forfeit the contract, all payments thereunder being due, without first tendering a deed. This rule will not, however, be applied where the contract stipulates that the vendor is purchasing the property from *X* and that the payments accruing under his contract with *X* will be made from the vendee's payments to the vendor. *Learn v. Downing*, 178 Wash. 223, 34 P. (2d) 885 (1934).

A notice by the vendor under a contract for the sale of land that he elects to forfeit the contract for non-payment, is inoperative unless accompanied by a tender of conveyance, all payments due from the vendee having accrued. Such notice is not, however, a breach of the contract by the vendor and he may later put the vendee in default by tendering a deed. *Davis v. Downie Investment Co.*, 179 Wash. 470, 38 P. (2d) 215 (1934).

Section 276 (a)

Failure to pay on the due date subjects a real estate contract to forfeiture, time being expressly made of the essence. *Alhadeff v. Van Slyke*, 176 Wash. 244, 28 P. (2d) 797 (1934).

A provision in a contract, making time of the essence thereof, may be waived. *Townsend v. Rosenbaum*, 187 Wash. 372, 60 P. (2d) 251 (1936).

Section 276 (b)

Time is of the essence in an option contract for the sale of corporation shares; no express stipulation to that effect is necessary. *Andersen v. Brennen*, 181 Wash. 278, 43 P. (2d) 19 (1935).

Where a contract for freight hauling is expressly conditioned upon *P*'s getting a state contract-hauler permit, *P* has a reasonable time within which to procure such a permit. *Bracy v. United Retail Merchants*, 189 Wash. 162, 63 P. (2d) 491 (1937).

Section 284

H and *W* contracted to sell land to *P*, the price to be paid in installments. They then conveyed the land to *X Corporation*, the shares of which they owned. *P* refused to pay until the property was reconveyed to the vendors, whereupon the latter declared the contract to be forfeited. *P* sought to recover the payments he had made, arguing that the conveyance in question excused his further performance, and that the declaration of forfeiture was a breach of contract. Held: Since *H* and *W* controlled their corporate grantee, the conveyance did not excuse *P*'s non-performance. *Bruener v. Hillman*, 186 Wash. 663, 59 P. (2d) 731 (1936).

Section 295

R contracted to sell land to *E*, the contract indicating that *R* was buying the property from *X* and that *R*'s payments to *X* were to be made from *E*'s payments to *R*. Upon *E*'s default and even after maturity of the entire purchase price, *R* may forfeit the *R-E* contract without tendering a deed to *E*. *Learn v. Downing*, 178 Wash. 223, 34 P. (2d) 885 (1934).

By the terms of their contract *D* was to pay *P* a sum of money in each year that *D* handled a stipulated quantity of apples from *D*'s land. *D* handled most of the crop, but refused to receive the small additional amount which would have raised the total to the quantity upon which its promise to *P* was conditioned. Held: *D* must pay to *P* the sum promised. *Field v. Northwestern Fruit Exchange*, 180 Wash. 580, 40 P. (2d) 985 (1935).

In the course of their negotiations *P* and *D* agreed on the terms of a proposed contract, but *D* conditioned his obligation upon the execution of a written contract. *D*, having thereafter refused to join with *P* in a written contract, may not avail himself of the condition. *Payne v. Ryan*, 183 Wash. 590, 49 P. (2d) 53 (1935).

Section 297

Cases involving insurance contracts, waiver found: *Reynolds v. Travelers Ins. Co.*, 176 Wash. 36, 28 P. (2d) 310 (1934); *Watts v. Federal etc. Co.*, 181 Wash. 679, 44 P. (2d) 197 (1935); *Hedrick v. Washington Natl. Ins. Co.*, 186 Wash. 263, 57 P. (2d) 1038 (1936); *Brown v. Mutual Life Ins. Co.*, 189 Wash. 315, 65 P. (2d) 391 (1937).

Case involving insurance contract, no waiver found: *Eakle v. Hayes*, 185 Wash. 520, 55 P. (2d) 1072 (1936).

One who has contracted to buy real estate waives the delay of his vendor in furnishing title insurance as agreed, by continuing his own performance without protest. *Alhadeff v. Van Slyke*, 176 Wash. 244, 28 P. (2d) 797 (1934); *Nagel v. Edmonston*, 178 Wash. 577, 35 P. (2d) 64 (1934). The vendor's right to prompt payment is unaffected by his receipt of several earlier payments after their due date, as he informed the vendee when accepting such payments that he was not thereby waiving prompt payment of future installments. *Alhadeff v. Van Slyke*, 176 Wash. 244, 28 P. (2d) 797 (1934).

Commercial contract, no waiver found: *Vail v. Bailey*, 178 Wash. 490, 35 P. (2d) 37 (1934).

Section 298 (1)

Bunge v. Brotherhood etc., 178 Wash. 33, 33 P. (2d) 383 (1934) (no waiver found.)

Section 300

Cases involving real estate contracts in which the court found a waiver through acceptance of late payments: *Townsend v. Rosenbaum*, 187 Wash. 372, 60 P. (2d) 251 (1936); *Knowles v. LaPure*, 189 Wash. 456, 65 P. (2d) 1260 (1937).

Case involving conditional sales contracts for the purchase of personal property: *Pearson v. Picco*, 181 Wash. 613, 44 P. (2d) 186 (1935).

Section 301

Insanity of the insured does not excuse a policy condition requiring notice of disability. *Bloss v. Equitable Life Assurance Society*, 176 Wash. 1, 28 P. (2d) 303; 33 P. (2d) 375 (1934). (Judgment for insured in trial court; reversed in a departmental decision on the ground indicated above, among others; court evenly divided in a re-hearing en banc); *Reynolds v. Travelers Ins. Co.*, 176 Wash. 36, 28 P. (2d) 310 (1934).

Section 302

Grosgebauer v. Schneider, 177 Wash. 282, 31 P. (2d) 910 (1934).

Section 303

"The provision in the contract making the engineer's estimates final is effective, unless the estimates are made on a fundamentally wrong basis, or the engineer acts capriciously or arbitrarily in making them." *Coyle Construction Co. v. Skagit County*, 177 Wash. 520, 32 P. (2d) 106 (1934).

Section 306

The vendor under a contract for the sale of land may maintain

an action for the purchase price despite his failure to tender a conveyance, it appearing that such a tender would have been refused by the vendee. *First National Bank v. Mapson*, 181 Wash. 196, 42 P. (2d) 782 (1935).

Section 311

Despite prior indulgences allowed to the vendee, a real estate contract may be forfeited by the vendor after reasonable notice of his intention to do so unless delinquencies be paid up. *Granston v. Boileau*, 177 Wash. 640, 33 P. (2d) 96 (1934); *Nagel v. Edmonston*, 178 Wash. 577, 35 P. (2d) 64 (1934).

Section 314

Case involving real estate contract: *Knowles v. LaPure*, 189 Wash. 456, 65 P. (2d) 1260 (1937).

Cases involving contracts for the sale of personal property: *Poston v. Western Dairy Products Co.*, 179 Wash. 73, 36 P. (2d) 65 (1934); *Harris v. Puget Sound, etc. Co.*, 179 Wash. 546, 38 P. (2d) 354 (1934); *Parks v. Sterling Box Machine Co.*, 186 Wash. 269, 57 P. (2d) 1032 (1936); *Crandall Engineering Co. v. Winslow Marine etc. Co.*, 188 Wash. 1, 61 P. (2d) 136 (1936); *Heian v. Fischer*, 189 Wash. 59, 63 P. (2d) 518 (1937).

Section 315

Payne v. Ryan, 183 Wash. 590, 49 P. (2d) 53 (1935).

Section 329

Contracts for the sale of personal property: *Gatke v. McDuffie*, 178 Wash. 107, 34 P. (2d) 348 (1934); *Poston v. Western Dairy Products Co.*, 179 Wash. 73, 36 P. (2d) 65 (1934).

Section 331

Automatic Canteen Co. of Washington v. Automatic Canteen Co. of America, 182 Wash. 133, 45 P. (2d) 41 (1935).

Section 337

Nelson v. Seattle, 180 Wash. 1, 38 P. (2d) 1034 (1934); *Woodbridge v. Johnson*, 187 Wash. 191, 59 P. (2d) 1135 (1936).

Section 339 (1)

The insertion of a forfeiture clause in a contract for the sale of personal property, without stipulating that forfeiture shall be the seller's only remedy, merely makes available an additional type of relief and does not impair the seller's normal remedies. *Blass v. Waldrip*, 176 Wash. 324, 29 P. (2d) 403 (1934). Same holding, contract for the sale of real property. *Reiter v. Bailey*, 180 Wash. 230, 39 P. (2d) 370 (1934). But where a contract for the sale of real property provides that the contract "shall be considered by both parties as null and void in every tenor and effect" upon surrender by the buyer of his copy of the contract or of a quit claim deed, after compliance by the buyer with the

indicated conditions he cannot be held for the purchase price. *Mogul Logging Co. v. Smith Livesey Wright Co.*, 185 Wash. 509, 55 P. (2d) 1061 (1936).

Where the seller of personal property expressly limits his liability for breach of warranty to replacement, the buyer cannot hold him for other damages. *Crandall Engineering Co. v. Winslow Marine, etc. Co.*, 188 Wash. 1, 61 P. (2d) 136 (1936).

Case holding a liquidated damages provision to be enforceable: *Mosler v. Woodell*, 189 Wash. 583, 66 P. (2d) 353 (1937).

Section 347 (1) (a)

Cases involving real estate contracts: Upon destruction by fire of the dwelling house situated upon the lots contracted to be sold the vendee may avoid the contract and recover the payments he has made plus interest thereon. But the vendor may offset against such recovery the reasonable rental value of the vendee's occupancy of the property. *Johnson v. Stalcup*, 176 Wash. 153, 28 P. (2d) 279 (1934). Upon breach by the vendor the vendee is entitled to "the return of the payments made under the contract, with interest thereon at the legal rate from date (vendor) repossessed the property, less the reasonable value of the use of the property from the date the (vendee) entered into possession to the date the (vendor) unlawfully repossessed the property." *Knowles v. La-Pure*, 189 Wash. 456, 65 P. (2d) 1260 (1937).

Under a forfeiture clause the vendor may, upon the vendee's default, terminate the latter's interest in the property. *Barrett v. Bartlett*, 189 Wash. 482, 65 P. (2d) 1279 (1937).

Section 347 (2)

See Section 347 (1) (a).

Section 357 (1) (a)

P contracted to sell a specified quality of coal. *P* mixed coal of this quality with inferior grades and delivered the mixture under its contract. Held: *P* cannot recover for the coal so delivered. *Continental Coal Co. v. United Fuel Co.*, 176 Wash. 271, 29 P. (2d) 395 (1934).

Section 370

Specific enforcement will be refused where the alleged contract is not proved by clear and certain evidence. *Lager v. Berggren*, 187 Wash. 462, 60 P. (2d) 99 (1936).

Section 375 (1)

State ex rel Union etc. Assn. v. Sup. Ct., 176 Wash. 482, 30 P. (2d) 231 (1934) (Restatement cited); *Barrett v. Bartlett*, 189 Wash. 482, 65 P. (2d) 1279 (1937).

Section 384 (1)

P sued to rescind a real estate contract on the ground of fraud.

D made counter-claim to recover damages for *P*'s breach of the contract. Held: That the counter-claim constituted an acquiescence in the rescission sought by *P*, leaving to *D* only the action for damages. *Russell v. Stephens*, 189 Wash. 233, 64 P. (2d) 787 (1937). Reversed on rehearing, 91 Wash. Dec. 279, 71 P. (2d) 30 (1937).

Section 387 (b)

McHugh v. Rosaia, 184 Wash. 463, 51 P. (2d) 616 (1935).

Section 389 (e)

Accord with *Crane Co. v. Pacific Heat & Power Co.*, 36 Wash. 95; *Pioneer Sand & Gravel Co. v. Greystadt*, 181 Wash. 239, 42 P. (2d) 43 (1935); (*dictum*) *United Pacific Casualty Ins. Co. v. Port of Everett*, 182 Wash. 285, 46 P. (2d) 736 (1935).

Section 394 (1)

"If neither the debtor nor the creditor applies the payment specially, then the law will apply it to the oldest account." *Dietrich Bros. Inc. v. Anderson*, 183 Wash. 574, 48 P. (2d) 921 (1935).

Section 397

Material breach: *Barrett v. Bartlett*, 189 Wash. 482, 65 P. (2d) 1279 (1937).

Section 399 (1)

P sold to *D* on conditional sales contract a player piano. The instrument, being defective, would not play and *P* failed to remedy the defect. Held: *D* is not liable for the price. *National Assn. of Creditors, Inc. v. Ultican*, 190 Wash. 109, 66 P. (2d) 824 (1937).

Section 400 (1) (a)

National Assn. of Creditors, Inc. v. Ultican, 190 Wash. 109, 66 P. (2d) 824 (1937).

Section 406

On the facts in the following cases no mutual rescission was found: *Roethemeyer v. Milton*, 177 Wash. 650, 33 P. (2d) 99 (1934); *Van Keulen v. Sealander*, 183 Wash. 634, 49 P. (2d) 19 (1935).

Section 408

A written contract, of a type covered by the Statute of Frauds, and subsequently modified by oral agreement, is unenforceable. *Hamilton, Inc. v. Atlas Freight, Inc.*, 184 Wash. 199, 50 P. (2d) 522 (1935). (This case is *contra* to the Restatement.)

Section 417

Cases in which no consideration was found for an alleged accord and satisfaction: *Seattle Investors Syndicate v. West Dependable Stores*, 177 Wash. 125, 30 P. (2d) 956 (1934); *Graham v. New York Life Ins. Co.*, 182 Wash. 612, 47 P. (2d) 1029 (1935) (also no mutual assent); *Grandview Inland Fruit Co. v. Hartford Fire Ins. Co.*, 189 Wash. 590, 66 P. (2d) 827 (1937).

An irrigation district may by paying the principal sum of its bonds afford consideration for an accord and satisfaction discharging its liability both for such bonds and for a disputed claim for interest thereon. *Paulsen Estate, Inc. v. Naches-Selah Irrigation District*, 190 Wash. 205, 67 P. (2d) 856 (1937).

Larson v. Rice, 100 Wash. 642, was followed in *Goebel v. Elliott*, 178 Wash. 444, 35 P. (2d) 44 (1937), a case involving Seattle ordinance No. 60812 relative to the wages to be paid by contractors on city work.

In connection with the consideration question, to the earlier annotations add *Conlan v. Spokane Hardware Co.*, 117 Wash. 378, 201 Pac. 26 (1921); *Vigelius v. Vigelius*, 169 Wash. 190, 13 P. (2d) 425 (1932).

Section 417 (b)

Yanoscheck v. Montgomery Ward & Co., 176 Wash. 137, 28 P. (2d) 270 (1934); *Clubb v. Sentinel Life Ins. Co.*, 181 Wash. 284, 42 P. (2d) 792 (1935); *Irwin v. Pacific Fruit & Produce Co.*, 188 Wash. 572, 63 P. (2d) 382 (1936).

Section 420

A creditor who accepts a remittance tendered as full settlement of his debtor's unliquidated obligation may not thereafter deny the satisfaction of his claim. *Irwin v. Pacific Fruit & Produce Co.*, 188 Wash. 572, 63 P. (2d) 382 (1936), (Restatement cited); *Paulsen Estate, Inc. v. Naches-Selah Irrigation District*, 190 Wash. 205, 67 P. (2d) 856 (1937).

Section 422 (1)

On the facts, no account stated found: *Stinson v. Stallsmith*, 178 Wash. 383, 34 P. (2d) 1117 (1934).

An account stated creates a new cause of action; the Statute of Limitations starts to run anew at the time the account is stated. *Dietrich Bros. Inc. v. Anderson*, 183 Wash. 574, 48 P. (2d) 921 (1935).

Section 434

X received a note evidencing an antecedent debt and a mortgage securing the note. He erased his name as obligee of these instruments and substituted that of Y. Later X learned that the alterations made the note and mortgage unenforceable, so he surrendered them to the obligor. Held: the alteration being without fraudulent purpose X's assignee may enforce the underlying obligation. *Berg v. Poeppel*, 181 Wash. 207, 42 P. (2d) 806 (1935).

Where the holder of a note and mortgage so materially alters the former as to preclude his suing upon it, he may nevertheless foreclose the mortgage upon showing that the alteration was made without fraudulent purpose. *Hansen v. Lathrop*, 182 Wash. 13, 44 P. (2d) 781 (1935).

Section 455

X contracted to remove the product of road excavation work. He is not excused by the fact that in wet areas tractor trucks, a type he did not possess and could not get without increased expense, proved to be necessary. *Harms, Inc. v. Meade*, 186 Wash. 287, 57 P. (2d) 1052 (1936).

Section 467

See Sec. 455, above.

Section 470 (1)

Depositors Bond Co. v. Christensen, 185 Wash. 161, 53 P. (2d) 312 (1936).

Section 470 (2)

An applicant for fire insurance falsely stated that she had not previously suffered a fire loss. This misrepresentation is material. *Perry v. Continental Ins. Co.*, 178 Wash. 24, 33 P. (2d) 661 (1934).

Section 471 (a)

The seller of a grader informed the buyer that the machine would operate satisfactorily under the working conditions described by the buyer. This statement proved to be false. Rescission on the ground of fraud was denied to the buyer because the misrepresentation did not relate to an existing fact. *Webster v. Romano Engineering Corp.*, 178 Wash. 118, 34 P. (2d) 428 (1934).

Section 472 (1) (a)

X applied for reinstatement of a lapsed life insurance policy, stating in her application that she was in good health. Thereafter and before the insurer had acted upon the application X suffered hemorrhages of the lungs and learned from her physician that she had tuberculosis. The insurer was not apprised of these developments and issued the reinstatement. Held: X's concealment of the information which she acquired between the date of her application and the date of the reinstatement was fraudulent. *Reilly v. New York Life Ins. Co.*, 182 Wash. 460, 47 P. (2d) 840 (1935).

Section 474

Statements which would normally be of opinion only, may be relied on when made by a seller who is an expert to a buyer who is not. *Lambach v. Lundberg*, 177 Wash. 568, 33 P. (2d) 105 (1934).

Misrepresentations by the seller of a grader respecting its performance under conditions described by the buyer are not fraudulent, being mere statements of opinion by one who had no special knowledge of the conditions under which the machine was to be

used. *Webster v. Romano Engineering Corp.* 178 Wash. 118, 34 P. (2d) 428 (1934).

The seller of a Diesel engine represented that it would develop more power than and perform equally as well as a GL 6 Buda motor. These statements proved to be false, and are held to be representations of fact. *Peoples Bank and Trust Co. v. Romano Engineering Corp.*, 188 Wash. 290, 62 P. (2d) 445 (1936).

Section 475

Fishermen who already had a contract for stipulated prices were induced to sign a supplemental writing in which they agreed to accept the "going price in the Kodiak district," a price fixed or capable of being fixed by a few canneries including the employer of these fishermen, under circumstances indicating that they were unaware of the nature of the instrument they signed and that the fish company had followed a course deliberately calculated to throw the fishermen off guard. Held: the supplement agreement is inoperative. *Knutsen v. Alitak Fish Co.*, 176 Wash. 169, 28 P. (2d) 334 (1934).

Fraud not found in the evidence presented: *Hansen v. Parsons*, 180 Wash. 413, 40 P. (2d) 121 (1935).

Section 476

Contract involving real estate: *Patricio v. Scott*, 189 Wash. 302, 65 P. (2d) 215 (1937).

Contracts involving personal property: *Lambach v. Lundberg*, 177 Wash. 568, 33 P. (2d) 105 (1934); *Depositors Bond Co. v. Christensen*, 185 Wash. 161, 53 P. (2d) 312 (1936); *Peoples Bank and Trust Co. v. Romano Engineering Corp.*, 188 Wash. 290, 62 P. (2d) 445 (1936).

Insurance contracts: *Perry v. Continental Ins. Co.*, 178 Wash. 24, 33 P. (2d) 661 (1934); *McCann v. Reeder*, 178 Wash. 126, 34 P. (2d) 461 (1934); *Paulson v. Montana Life Ins. Co.*, 181 Wash. 526, 43 P. (2d) 971 (1935); *Reilly v. New York Life Ins. Co.*, 182 Wash. 460, 47 P. (2d) 840 (1935).

Section 477

In the course of negotiations for the purchase and sale of land the buyer attempted to verify the seller's statement concerning the balance remaining unpaid on a mortgage covering the property, by consulting W, agent of the mortgagee. W, in the seller's presence and without correction by the seller, mis-stated the amount due. Held: The seller is responsible for W's statement. *Patricio v. Scott*, 189 Wash. 302, 65 P. (2d) 215 (1937).

Section 483 (1)

A delay of seven months after discovery of fraud is not such laches as will bar rescission of a purchase of stock. *Depositors*

Bond Co. v. Christensen, 185 Wash. 161, 53 P. (2d) 312 (1936).

Section 483 (2)

On the facts, held that the delay was not too great. *Lambach v. Lundberg*, 177 Wash. 568, 33 P. (2d) 105 (1934).

Section 484

There can be no rescission of a conditional sales contract on the ground of fraud where the vendee, after acquiring knowledge of the facts, sold a portion of the property as his own. *Lucos v. Andros*, 185 Wash. 383, 55 P. (2d) 330 (1936).

Section 487

A life insurance policy containing double indemnity and disability benefits was procured through the insured's fraud. An incontestable clause applied only to the life insurance feature of the policy. After the contestable period had elapsed the fraud was discovered and the insurer sought to cancel the policy and to reissue it as a life insurance contract only. Held: for the insurer. *Paulson v. Montana Life Insurance Co.*, 181 Wash. 526, 43 P. (2d) 971 (1935).

Section 488

A physician by fraudulently misrepresenting her physical condition induced X to submit to a course of treatment for which X paid in part. X may recover the payments so made. *Barker v. Weeks*, 182 Wash. 384, 47 P. (2d) 1 (1935).

Section 493 (c)

On the facts, no duress found: *Bair v. Spokane Savings Bank*, 186 Wash. 472, 58 P. (2d) 819 (1936).

Section 493 (e)

X, a car salesman, was required by his employer to purchase a demonstrator and did so on conditional sales contract. He was later discharged, defaulted on his car payments and lost the car to the finance company, to which the contract had been assigned. X then sued his employer on an alleged oral promise made at the time of the car purchase, to indemnify X from loss on such purchase. Held: X may prove the oral promise and recover thereon. *Champlin v. Transport Motor Co.*, 177 Wash. 659, 33 P. (2d) 82 (1934). The reasoning of the court is not entirely clear. It is first pointed out that the subject matter of the oral contract differed from that of the conditional sales contract and hence that the parol evidence rule would not exclude the former. But the court goes on, apparently finding that X was forced into buying the car by "business compulsion," which fact in some way justified admission of the parol evidence proving the indemnity contract.

Assent of the employer to a President's Reemployment Agreement, executed pursuant to the National Industrial Recovery Act,

was induced by economic duress. *McDonald v. Pend Oreille, etc. Co.*, 189 Wash. 389, 65 P. (2d) 1250 (1937).

Section 495

Champlin v. Transport Motor Co., 177 Wash. 659, 33 P. (2d) 82 (1934); *McDonald v. Pend Oreille etc. Co.*, 189 Wash. 389, 65 P. (2d) 1250 (1937).

Section 497

On the facts, undue influence found: *Re Madden's Estate*, 176 Wash. 51, 28 P. (2d) 280 (1934); *Reaugh v. Dickey*, 183 Wash. 564, 48 P. (2d) 941 (1935).

Section 499

There may be no avoidance of a note and mortgage on the ground of duress where the obligor made payments on the note during several years after its execution. *Bair v. Spokane Savings Bank*, 186 Wash. 472, 58 P. (2d) 819 (1936).

Section 503

X issued to Y a policy of title insurance, neglecting to show a mortgage which X intended to except and of which Y was unaware. X may not have reformation of the policy to except this mortgage. *Baumann v. Puget Sound Title Ins. Co.*, 184 Wash. 9, 49 P. (2d) 914 (1935).

Section 504

Nelson v. Seattle, 180 Wash. 1, 38 P. (2d) 1034 (1934); *Miller v. United Pacific Casualty Ins. Co.*, 187 Wash. 629, 60 P. (2d) 714 (1936); *Stusser v. Gottstein*, 187 Wash. 660, 61 P. (2d) 149 (1936).

Section 505

"Now, if the agents of the (insurer), knowing the character of protection sought by the plaintiff, issued to him a form of contract that did not in terms furnish this protection, it was a fraud upon him, and he could prove by parol evidence, as he did, the terms of his application and the character of protection the (insurer) agreed to furnish." *Mossuto v. United States Casualty Co.*, 180 Wash. 481, 40 P. (2d) 170 (1935).

Section 507

Austin v. Dunn, 176 Wash. 453, 29 P. (2d) 740 (1934); *Mossuto v. United States Casualty Co.*, 180 Wash. 481, 40 P. (2d) 170 (1935); *Miller v. United Pacific Casualty Ins. Co.*, 187 Wash. 629, 60 P. (2d) 714 (1936).

Section 508

An insured is bound to examine his policy upon receiving it and his failure to do so is such negligence as will bar his later action to reform the policy. *Carew, Shaw & Bernasconi, Inc. v. General Casualty Co.*, 189 Wash. 329, 65 P. (2d) 689 (1937)

(dictum). This view appears to be *contra* to the Restatement, and to rest on the ground that the person seeking reformation must act within reasonable promptness after learning of the facts entitling him to such relief. Since the insured is presumed to know the contents of his policy when he receives it, undue delay bars the relief, even though actual knowledge of the policy's contents is not acquired until some time thereafter.

Section 510

See Sec. 508 above.

Section 511

Blass v. Waldrip, 176 Wash. 324, 29 P. (2d) 403 (1934); *Friend v. Continental Coal Co.*, 186 Wash. 102, 56 P. (2d) 1000 (1936); *Carew, Shaw & Bernasconi, Inc. v. General Casualty Co.*, 189 Wash. 329, 65 P. (2d) 689 (1937). *Smith v. Sunnyside Valley Irrigation Dist.*, 189 Wash. 577, 65 P. (2d) 1271 (1937).

Section 515 (a)

In a hiring agreement the employee, an optician, promised that after termination of the employment he would never enter into the business of optometry in Walla Walla or within one mile of the corporate limits thereof. This promise imposes an unreasonable restraint on trade. *Schneller v. Hayes*, 176 Wash. 115, 28 P. (2d) 273 (1934).

Section 515 (c)

The contracts made with its members by a milk producers association organized under Rem. Rev. Stat., Sec. 2878, and empowered to operate throughout the state do not create an unlawful monopoly. *Olympia Milk Producers Assn. v. Herman*, 176 Wash. 338, 29 P. (2d) 676 (1934).

Section 516 (a)

A shareholder in a corporate seller of a wholesale dry cleaning business located in Seattle covenanted in connection with the sale never to again engage in the wholesale dry cleaning business in Seattle. This is not an unreasonable restraint of trade. *United Dye Works v. Strom*, 179 Wash. 41, 35 P. (2d) 760 (1934).

Section 516 (e)

Olympia Milk Producers Assn. v. Herman, 176 Wash. 338, 29 P. (2d) 676 (1934). See Section 515 (c) above.

Section 516 (f)

Schneller v. Hayes, 176 Wash. 115, 28 P. (2d) 273 (1934) (restraint found to be unreasonable.) See Section 515 (a) above.

Section 525

See *Ash v. Clark*, 32 Wash. 390, 73 P. 351 (1903); *Catton v. Catton*, 69 Wash. 130, 124 Pac. 387 (1912).

Section 526

A note for \$2,400 at 8% interest and maturing in one year, from which the maker received only \$2,000, is usurious. *Celian v. Coast Finance Corp.*, 189 Wash. 676, 66 P. (2d) 363 (1937).

Section 550

By reason of Rem. Rev. Stat., Sec. 420, "common law arbitration does not exist in this state," and an arbitration agreement which does not comply with the statute will not be enforced. *Smith v. Dept. of Labor & Industries*, 176 Wash. 569, 30 P. (2d) 656 (1934).

Section 552 (2)

A contract by which an expert witness was to receive \$25 per day plus an additional \$25 per day should the litigation terminate in favor of the promisor is unlawful. *Wright v. Corbin*, 190 Wash. 260, 67 P. (2d) 868 (1937).

Section 570

X, Y and Z were executors of an estate. X and Y made a contract with a firm of which Z was a member for the rendition of legal services for the estate. The contract is not unlawful. *Jones v. Peabody*, 182 Wash. 148, 45 P. (2d) 915 (1935).

Section 574

The operator of a toboggan slide may exempt itself from liability for negligence, by contract with its customers. *Broderson v. Rainier National Park Co.*, 187 Wash. 399, 60 P. (2d) 234 (1936). (Restatement cited.)

Section 575 (2)

A carload of horses shipped by rail were injured through the negligence of the carrier. Held, under various provisions of Rem. Rev. Stat., Sec. 3673-1, that an attempted limitation of liability by the carrier was ineffective. *Wall-a-hee v. Northern Pacific Railway Co.*, 180 Wash. 656, 41 P. (2d) 786 (1935).

Section 580 (1)

"It seems to us self-evident that the public printer was not the kind of a state officer, and his compensation was not the kind of compensation, with which our constitution is concerned." The compensation of such printer may therefore be varied by the legislature. *State ex rel Hamilton v. Thomas*, 176 Wash. 544, 30 P. (2d) 373 (1934).

Only the state may question the power of a foreign corporation, which has not complied with local statutory regulations, to own land in Washington and to contract for its sale. *Townsend v. Rosenbaum*, 187 Wash. 372, 60 P. (2d) 251 (1936).

Section 580 (2) (a)

Rem. Rev. Stat. 9693 applies to a contract for the purchase of

a fire protection system by a port commission. *Reiter v. Chapman*, 177 Wash. 392, 31 P. (2d) 1005 (1934).

Ringstad v. Metropolitan Life Ins. Co., 182 Wash. 550, 47 P. (2d) 1045 (1935), (applying Rem. Rev. Stat., Sec. 7226).

Section 580 (2) (b) and (d)

A real estate broker may not recover for services rendered at a time when he does not hold a state license. *Irons Investment Co. v. Richardson*, 184 Wash. 118, 50 P. (2d) 42 (1935).

Section 580 (2) (d)

An attorney may not recover for services rendered at a time when he has not complied with Rem. Rev. Stat., Sec. 139-20. *Smith v. Kneisley*, 184 Wash. 26, 49 P. (2d) 916 (1935), (departmental decision). On re-hearing *en banc* the court said, without argument: “. . . a majority now entertains the view that the Departmental opinion cannot be sustained . . .”, and placed a decision for the defendant client on another ground. *Smith v. Kneisley*, 187 Wash. 278, 60 P. (2d) 14 (1936). The same issue arose again in *Niemeier v. Rosenbaum*, 189 Wash. 1, 63 P. (2d) 424 (1936), and was summarily dismissed with the observation that in the re-hearing on *Smith v. Kneisley* “it was in effect held that the failure of an attorney to pay such a registration fee would not preclude him from maintaining an action for legal services rendered.”

Section 584 (1) (a)

A contract for separate maintenance is not opposed to public policy. *Granat v. Granat*, 189 Wash. 308, 65 P. (2d) 220 (1937).

Section 598

Schneller v. Hayes, 176 Wash. 115, 28 P. (2d) 273 (1934); *Smith v. Department of Labor & Industries*, 176 Wash. 569, 30 P. (2d) 656 (1934); *Wall-a-hee v. Northern Pacific Railway Co.*, 180 Wash. 656, 41 P. (2d) 786 (1935); *Irons Investment Co. v. Richardson*, 184 Wash. 118, 50 P. (2d) 42 (1935); *Wright v. Corbin*, 190 Wash. 260, 67 P. (2d) 868 (1937).

X and *Y* entered into an unlawful contract, out of which transaction a fund accrued and was deposited in *X*'s name in a savings association. The passbook was then transferred by *X* to *Y*. The illegality of the transaction does not, as between *X* and *Y*, defeat *Y*'s title to the fund as evidenced by his possession of the passbook. *Donahoe v. Pratt*, 190 Wash. 103, 66 P. (2d) 873 (1937).

Section 601

“The right to recover usurious or illegal interest accrues, not from the contract under which usury is paid, nor from any implication contained in the contract itself, but from a duty imposed by law to repay an unjust and unmerited enrichment.” The

three year rather than the six year statute of limitations is accordingly applicable. *Edwards v. Surety Finance Co.*, 176 Wash. 534, 30 P. (2d) 225 (1934).

The maker of a note secured by a chattel mortgage may defeat foreclosure of the mortgage by showing that the note was usurious and that payments made plus penalties exceeded the unpaid balance thereon. *Celian v. Coast Finance Corp.*, 189 Wash. 676, 66 P. (2d) 363 (1937).

Section 607

The lawful and the unlawful provisions of the exhibitors contract before the court are so inter-related as to preclude enforcement of the former. *Metro-Goldwyn-Mayer Dist. Corp. v. Kiggins*, 184 Wash. 497, 51 P. (2d) 690 (1935).